3.2 Reasonable Accommodation[66]

[Updated: 6/14/02]

Pattern Jury Instruction

Federal law requires employers to provide reasonable accommodation to employees who are disabled[67] unless the accommodation would impose an undue hardship on the employer or pose a direct threat to the employee or others.[68]

"Direct threat" means a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.

A reasonable accommodation is a modification or adjustment to the work environment or to the manner in which a job is performed.[69] A reasonable accommodation may include:[70] [modifying or adjusting a job application process to enable a qualified applicant with a disability to be considered for the position; making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedule; reassignment to a vacant position; acquisition or modifications of examinations, training materials or policies; provision of qualified readers and interpreters; other similar accommodations for individuals with plaintiff's disabilities].[71]

A reasonable accommodation does not include changing or eliminating any essential function of a job, shifting any of the essential functions of the job to others, or creating a new position for the disabled employee.[72] If [plaintiff] rejects a reasonable accommodation that is necessary to enable [plaintiff] to perform the essential functions of the position, and, as a result, cannot perform the essential functions of the position, [plaintiff] cannot be considered a qualified individual.

An "undue hardship" is an action that would create significant difficulty or expense for [employer], considering the nature and cost of the accommodation, the overall financial resources of [employer], the effect of the accommodation on expenses and resources, and the impact of the accommodation on the operations of [employer], including the impact on the ability of other employees to perform their duties and the impact on [employer]'s ability to conduct business.

[Plaintiff] bears the burden of proposing an accommodation that would enable [him/her] to perform the job effectively and is, at least on the face of things, reasonable. If [plaintiff] meets this burden, then [defendant] bears the burden of proving that the accommodation [plaintiff] proposed would have been an undue hardship. [73]

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[66] A reasonable accommodation instruction may be appropriate in either disability or religious discrimination cases. See 42 U.S.C. § 2000e(j) (2001) ("The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."); 42 U.S.C. § 12111 (2001) ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment

position that such individual holds or desires.").

The Equal Employment Opportunity Commission guidelines concerning reasonable accommodation are at 29 C.F.R. §§ 1605 (religious discrimination) and 1630 (disability discrimination). Although this instruction is focused on disability discrimination, it should be usable, with appropriate modification, for religious discrimination cases as well. See generally Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (Title VII religious discrimination) (White, J.).

[67] Also, "[t]he duty to provide reasonable accommodation is a continuing one, . . . [that is] not exhausted by one effort." Ralph v. Lucent Tech., Inc., 135 F.3d 166, 172 (1st Cir. 1998) (ADA) (Skinner, Sr. Dist. J., D. Mass.). But a plaintiff may not base an ADA claim on the defendant's denial of a request for accommodations where the plaintiff's disability did not exist at the time of the request, but rather was allegedly caused by the defendant's failure to honor the request. Santiago Clemente v. Executive Airlines, Inc., 213 F.3d 25, 31 (1st Cir. 2000) (ADA) (Campbell, J.).

[68] Although the language of the ADA includes only a direct threat to "other individuals in the workplace," 42 U.S.C. § 12113(b), the EEOC's implementing regulations include direct threats to "*the individual or* others in the workplace." 29 C.F.R. § 1630.15(b)(2) (emphasis added). The Supreme Court upheld the validity of the EEOC's more expansive definition in Chevron U.S.A. Inc. v. Echazabal, 122 S. Ct. 2045 (2002).

[69] The assessment of whether an accommodation is reasonable must be individualized and situation specific; a court may not use per se rules. Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000) (ADA) (Lynch, J.). However, the Supreme Court has said that "ordinarily" an accommodation that would run afoul of a seniority system is not reasonable, U.S. Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1524 (2002) (ADA) (Breyer, J.), and that a plaintiff must "show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts." Id. at 1525.

[70] This list should be modified in accordance with the facts of the case.

[71] For examples of cases involving specific types of accommodation, see: Kvorjak v. Maine, 259 F.3d 48, 57 (1st Cir. 2001) (ADA) (Coffin, J.) (work at home); Phelps v. Optima Health, Inc., 251 F.3d 21, 26-27 (1st Cir. 2001) (ADA) (Torruella, C.J.) (job sharing and job creation); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 260 (1st Cir. 2001) (ADA) (Lynch, J.) ("permission to walk away from any stressful conflict"); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 646 (1st Cir. 2000) (ADA) (Lynch, J.) (additional leave beyond that allowed by the employer's leave policy); Ward v. Massachusetts Health Research Institute, 209 F.3d 29, 37 (1st Cir. 2000) (ADA) (Torruella, C.J.) (flexible work schedule); Soto-Ocasio v. Federal Express Corp., 150 F.3d 14, 20 (1st Cir. 1998) (ADA) (Stahl, J.) (reallocation of job duties); Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998) (ADA) (Godbold, J.) (leave of absence and leave extension); Equal Employment Opportunity Commission v. Amego, Inc., 110 F.3d 135, 147-48 (1st Cir. 1997) (ADA) (Lynch, J.) (reallocation of job duties).

[72] Phelps v. Optima Health, Inc., 251 F.3d 21, 26-27 (1st Cir. 2001) (ADA) (Torruella, C.J.). Furthermore, the fact that an employer voluntarily offered an accommodation at one time does not mean that it must offer the same accommodation in a subsequent situation. Id. at 26 ("to find otherwise would discourage employers from granting employees any accommodations beyond those required by the ADA").

[73] U.S. Airways, Inc. v. Barnett, 122 S. Ct. 1516, 1522 (2002) (ADA) (Breyer, J.). The plaintiff "bears the burden of proposing an accommodation that would enable him [or her] to perform [the] job effectively and is, at least on the face of things, reasonable." Kvorjak v. Maine, 259 F.3d 48, 55 (1st Cir. 2001) (ADA) (Coffin, J.); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258-60 (1st Cir. 2001) (ADA) (Lynch, J.) (once plaintiff has met his or her burden, defendant bears burden of proving that the proposed accommodation would be an undue hardship); see also id. (discussing the "well recognized tension" between the plaintiff's and the defendant's burdens).

Beyond this division of the responsibility for proposing and proving the availability of a reasonable accommodation after the fact (at trial), the Equal Employment Opportunity Commission's implementing regulations provide that "it may be necessary for the [employer] to initiate an informal, interactive process" with the employee in order to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(2) cited in Kvorjak, 259 F.3d at 52. An employer may be liable for a failure to engage in this interactive process if the plaintiff can demonstrate that "had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions." Kvorjak, 259 F.3d at 52; Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 515 (1st Cir. 1996) (ADA) (Torruella, C.J.) (upholding judgment for defendant but noting that "[t]here may well be situations in which the employer's failure to engage in an informal interactive process would constitute a failure to provide reasonable accommodation that amounts to a violation of the ADA"). However, a plaintiff who

refused to participate in the interactive process may not base an ADA claim on the failure of that process. Phelps v. Optima Health, Inc., 251 F.3d 21, 27-28 (1st Cir. 2001) (ADA) (Torruella, C.J.).